IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICITON

WRIT PETITION NO.2237 OF 2007

Conwood Pre-Fab Pvt. Ltd. & Anr. .. Petitioners

Versus

The Union of India & 2 ors. .. Respondents

Mr.A. Hidaytullah, senior counsel with Mr.Makrand Joshi and Ridob Chand i/by DSK Legal for the Petitioner.

Mrs.S.V. Bharucha with Mr.H.P. Chaturvedi for the respondents.

CORAM : F.I. REBELLO &
J.P. DEVADHAR, JJ.

DATED : 18TH OCTOBER, 2007.

P.C. :

1. Rule. Heard forthwith.

2. The petitioners have approached this Court against the order dated 14-5-2007, whereby the application for recalling / rectification has been dismissed on the ground that the same would amount to an exercise in review jurisdiction. It is the submission of the learned counsel that they had drawn the attention of the Tribunal to the Judgment of the Supreme Court in the case of Collector of Central Excise, Bombay V/s. Bharat Bijlee Limited [2006 (198) E.L.T. 489 (S.C.)], where the Supreme Court has held that failure to take into consideration the material evidence, which is

present on record, would amount to mistake apparent on face of record and Tribunal has jurisdiction to correct such mistake in exercise of its powers under Section 35C(2) of Central Excise Act, 1944.

It is further submitted that the Tribunal while disposing of the appeal, mainly proceeded on the concession made by the counsel and did not consider the material on record. It is the case of the petitioners that the goods are used for pre fabricated buildings.

3. We have heard learend counsel for the parties. The Tribunal in its earlier order relied on the Judgment of the Tribunal in the case of Excon Bldg. Material Mfg. Co. Pvt. Ltd. V/s. Commissioner of Central Excise, Bombay decided on 23-11-1998. The Supreme court in Excon Bldg. Material Mfg. Co. Pvt. Ltd. V/s. Commissioner of Central Excise, Bombay [2005 (186) E.L.T. 263 (S.C.)] in para 5 has been pleased to observe that, "In reply to the show cause notice the Appellants never claimed that their blocks could be used in pre-fabricated buildings or that they were intermediate or components or pre-fabricated buildings. They only claimed that the benefit of the Notification was available even to blocks, slabs, and lintels falling under Tariff Item

No.68.07 even though such blocks, slabs and lintels did not constitute an intermediary or component of a pre-fabricated building."

From the above observations it is clear that the benefit of the notification is determinative based on the use of the goods. Before the Tribunal, matter proceeded on a concession as can be noted in para 3 of the judgment of Tribunal dated 27-1-2006. Considering the contention urged on behalf of the petitioners and considering the judgment of the Supreme Court in Bharat Bijlee Limited (Supra), in a case where the material on record was not considered, that would fall within the expression ‘rectification’ and not review.

5. Considering the above, in our opinion, the impugned order is liable to be set aside and accordingly order dated 14-5-2007is set aside and the matter is remanded back to the Tribunal for rehearing the rectification application in accordance with law.

6. Rule is made absolute accordingly with no order as to costs.

(F.I. REBELLO, J.)

(J.P. DEVADHAR, J.)